Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

MARC THIRY, et al.,
Petitioners,

v.

E. DEAN CARLSON, et al.,
Respondents,

and

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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75 pp

QUESTIONS PRESENTED.

1. Whether the taking of land containing the gravesite of parents' stillborn baby daughter for a highway project is a substantial burden on the parents' free exercise of their religious beliefs and practices under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb.

2. Whether the taking of land containing the gravesite of parent's stillborn baby daughter for a highway project falls within the hybrid rights exception to the rule of *Employment Division v. Smith*, 494 U.S. 872 (1990) as a violation of the parents' rights under the First and Fourteenth Amendments to the U.S. Constitution.

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioners:

Marc Thiry
Diane De Fries Thiry
The John D. De Fries Trust

Respondents:

E. Dean Carlson, Kansas Secretary of Transportation
Kansas Department of Transportation
City of Basehor, Kansas
City of Tonganoxie, Kansas
County of Leavenworth, Kansas

and

United States of America (Intervenor below)

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No. _____

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UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

The Court of Appeals for the Tenth Circuit entered its judgment in this case on March 15, 1996. The Tenth Circuit panel denied a request for rehearing and a suggestion for rehearing in banc on April 17, 1996.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Notification to the United States Attorney General that the constitutionality of an Act of Congress was drawn into question was given by the District Court on December 14, 1994. This notice satisfies the notice required by Supreme Court Rule 29.4(b). The United States of America, by and through the U.S. Department of Justice, has intervened in this case.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the United States Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;...

Fourteenth Amendment to the United States Constitution:

Section 1. ...nor shall any State deprive any person of life, liberty, or property, without due process of law;

Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb, et seq.

The full text of this statute is set forth in the appendix of this petition.

STATEMENT OF THE CASE

The primary issue in this appeal is whether the rights of Marc Thiry and Diane De Fries Thiry would be violated under the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb, (RFRA), by having the gravesite of their stillborn baby daughter destroyed by the State of Kansas' highway project.

The Thirys' daughter, Qatlin Soux De Fries Thiry, is buried within a 4.12-acre tract that is sought by the Respondents for a highway project on U.S. 24-40 extending from Basehor to Tonganoxie in southern Leavenworth County, Kansas. The John D. De Fries Trust has held the ownership interests in the land. The Thirys reside on Stranger Creek Ranch, which adjoins the 4.12-acre tract. Diane De Fries Thiry is a beneficiary of the Trust.

Marc Thiry and Diane De Fries Thiry profess sincerely held beliefs in American Indian spirituality and Christianity. Diane De Fries Thiry is one-thirty-second Delaware Indian.

Qatlin's grave is marked by a wooden cross. The cross carries spiritual significance to the Thirys in that the cross is a symbol of resurrection through which the soul and spirit of Qatlin attain eternal life. The gravesite is also marked by a dark red quartzite boulder. The boulder has symbolic religious significance to the Thirys in forming a spiritual bond between Qatlin's soul and spirit and her final resting place throughout her eternal life. The Thirys experience profound closeness with God and with Qatlin's spirit at the gravesite area.

Among the central religious tenets the Thirys practice are sanctity of gravesites, reverence toward deceased persons, and having a particular place of worship and prayer. The gravesite area has been a lifelong place of worship and prayer for Diane De Fries Thiry and has been one for Marc Thiry since before the Thirys' marriage in 1989. Upon their deaths the Thirys desire to be buried alongside Qatlin at the present gravesite.

The original design plans for the highway project called for an ordinary expansion of a two-lane highway into a four-lane highway. Under this design, a condemnation of the 4.12 acres would not have been necessary. However, turnarounds, or 150-foot medians were added to the original design. The expanded design called for a taking

of the gravesite area. The burial of Qatlin occurred before the Thirys had knowledge of the expanded road design.

The Kansas Department of Transportation[1] has identified at least three alternative locations to the turnaround. Testimony from Respondent's witnesses was that these alternatives would be as safe as the present design.

The United States of America intervened in the case after the Respondents challenged the constitutionality of RFRA.

The District Court entered a Temporary Restraining Order (See Appendix B) on the same day the Petitioners filed their Complaint after finding the Petitioner would suffer irreparable harm without the Order. The Petitioner posted a $500 bond as security for the TRO.

On December 16, 1994, the District Court entered a Preliminary Injunction (See Appendix C) after finding that the Petitioners would suffer irreparable harm without the injunction and that there was a likelihood the Petitioners could prevail on the merits.

After a trial, the District Court entered a judgment for the Respondents on all claims and denied the Petitioners' request for a final injunction (See Appendix D). The Tenth Circuit affirmed the District Court (See Appendix A).

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[1]References in this Petition to "KDOT" include E. Dean Carlson, Kansas Secretary of Transportation, the City of Basehor, Kansas, the City of Tonganoxie, Kansas and the County of Leavenworth, Kansas.

BASIS FOR FEDERAL JURISDICTION

The statutory grounds for federal jurisdiction in this case are 28 U.S.C. § 1331 and § 1343 and 42 U.S.C. 2000bb-1(c).

REASONS FOR GRANTING THIS PETITION

A. Religious Freedom Restoration Act

1. Effect of the Statute.

The decisions in this case rest on precedent that is in conflict with the Religious Freedom Restoration Act of 1993. Unless this conflict is resolved, the purpose of RFRA — to restore the state of Free Exercise case law, pre-1990 — will be thwarted.

Both the District Court and the Tenth Circuit relied primarily on the case of *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988) in determining the Petitioners' claim under RFRA.

In *Lyng*, Justice O'Connor writing for the Court, said:

> Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.
> Id., S.Ct. at 1326.

In *Lyng*, a group of American Indians attempted to block the construction of a road by the U.S. Forest Service on government-owned property in Northern California. A critical distinction between this case and *Lyng* is that the property in this case is privately owned. Thus, the state of Kansas is not simply managing its own affairs on its own property as was the case in *Lyng*. The Kansas Department of Transportation was allowed to condemn the property only under the terms of the preliminary injunction and order staying judgment pending appeal entered by the District Court. The same orders require the Respondents[2] to return the land to the Petitioners if the Petitioners ultimately prevail.

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[2] References in this Petition to "Respondents" do not include the United States of America.

The Court's statement in *Lyng* that it could not measure the effects of a governmental action on a religious practitioner is at odds with the clear directive in RFRA that no government may substantially burden a person's exercise of religion. 42 U.S.C. 2000bb-1(a). This directive implies that effects, or burdens, on a practitioner can and must be measured.

Justice O'Connor, who spoke for the Court in *Lyng*, later clarified her views in a concurrence in *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990) where she stated:

> In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. Id., S.Ct. at 1610.

Justice O'Connor resolves this contradiction between the cases later in her *Smith* opinion by equating *Lyng* to earlier authority that absolved the government from having to change its own internal functions to accommodate religious objections. Id., S. Ct. at 1611. (citing *Bowen v. Roy*, 476 U.S. 693, 106 S. Ct. 2147, 90 L.Ed.2d 735 [1986]) Under Justice O'Connor's views, *Lyng* may be good post-RFRA precedent, but it is not applicable to this case because this case is outside the realm of the government's own internal functions.

Because RFRA was passed in reaction to a recent case, *Smith*, and because the taking of private property is involved, and because this case hinges on the proper application of RFRA, it is necessary and important that this Court review the terms of RFRA and its legislative history to arrive at a proper interpretation for this case and others that follow it. When viewed in this light, it will become glaringly clear that if the Tenth Circuit's decision is allowed to stand, the purpose of RFRA will be thwarted.

In *Smith*, this Court held that neutral and generally applicable

laws could be applied to suppress religious practices, and that states need have no reason for refusing exemptions for the free exercise of religion. "In effect, the Court held that every American has a right to believe in a religion, but no right to practice it." Laycock, The Religious Freedom Restoration Act, 1993 B.Y.U. L. Rev. 221.

In RFRA, Congress found that *Smith*, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. 2000bb (a)(4). To counter *Smith*, Congress intended, "to restore the compelling state interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. 2000bb (b)(1).

Language that may have induced the Tenth Circuit to apply *Lyng* to this case was Congress' finding that, "the compelling state interest test as set forth in prior Federal Court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests." 42 U.S.C. 2000bb (a)(5).

Lyng is certainly a "prior Federal Court" ruling. But, among other reasons, *Lyng* is bad post-RFRA precedent because the Court did not apply the compelling state interest test. At least one commentator has adopted this view:

> RFRA does not "codify" the late pre-*Smith* approach and is, in legal effect, far more than a mere restoration of pre-Smith case law. It is a restoration of the high-water mark of free exercise accommodation, established by the cases of *Sherbert v. Verner* and *Wisconsin v. Yoder*-cases specifically embraced in RFRA's "purposes" section. Paulson, A RFRA Runs Through It: Religious Freedom and the U.S. Code., 56 Mont. L. Rev. 249, 256 (1995)

The correctness of Justice O'Connor's views about the burden-compelling interest test is underscored by her comment in *Smith* that:

> In both [*Roy*] and [*Lyng*], for example, we expressly

> distinguished *Sherbert* on the ground that the First Amendment does not require the Government itself to behave in ways that the individual believes will further his or her spiritual development ... (citing, *Roy*, 476 U.S. at 699, 106 S.Ct. at 2152; *Lyng* 485 U.S. at 499, 108 S.Ct. at 1325.) (emphasis in original) *Smith*, S.Ct. at 1611.

The language ultimately enacted by Congress was substantially similar to that advocated by Justice O'Connor. Compare, 42 U.S.C. 2000bb-1(a), (b) with, *Smith*, 494 U.S. at 894 (O'Connor, J., concurring). See also, S. Rep., reprinted in, 1993 U.S.C.C.A.N. at 1896 (quoting Justice O'Connor)

Again, *Sherbert* was one of the two cases Congress directs the Courts to look to in determining the substantial burden issue. Justice O'Connor's comment makes it clear that *Lyng*, in her view, is an internal governmental affairs case. Because this case, unlike *Lyng*, involves private property it is not an internal governmental affairs case.

Further undercutting the use of *Lyng* as applicable precedent is the issuance of Executive Order No. 13,007, signed May 24, 1996. 61 Fed. Reg. 26, 771 (1996). The order directs all agencies to accommodate access by Indian religious practitioners to Indian sacred sites and to avoid adversely affecting the physical integrity of those sacred sites.

Even the majority in *Smith* understood that the test mandated by RFRA was not applied in *Lyng*.

> In *Lyng*, (citation omitted), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices." Id., 494 S.Ct. at 1602-03.

The majority in *Smith* understood the "*Sherbert* analysis" to

be: "Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." Id., 494 S. Ct. at 1602. The least restrictive means requirement coupled with the substantial burden-compelling state interest elements produces the test mandated by RFRA. 42 U.S.C. 2000bb-1(a) and (b).

One other member of this Court has identified the inconsistency between *Smith* and previous Free Exercise cases.

> Since that precedent is nonetheless at odds with the *Smith* rule, as I have discussed above, the result is an intolerable tension in free-exercise law which may be resolved, consistently with principles of stare decisis, in a case in which the tension is presented and its resolution pivotal. *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S.520, 113 S. Ct. 2217, 124 L.Ed. 2d 472, 517 (1993) (Souter, J., concurring)

Although the passage of RFRA was intended to ease this tension, the application of *Lyng* to the present case has exacerbated the tension. As Justice Souter explained, this tension creates confusion over "not the usual question of whether to follow a constitutional rule, but the question of which constitutional rule" because *Smith* did not overrule any precedent. Id., 124 L.Ed. at 517. The case at bar evidences the continued tension noted by Justice Souter.

The importance of cutting this tension is not academic. Even though the Petitioners and the Intervenor below, the United States, defended the statute, the Respondents have challenged the constitutionality of RFRA.

Other courts have issued rulings on the constitutionality of RFRA, for example, *Flores v. City of Boerne*, F.3d 1352 (5th Cir. 1996). This court will eventually be called on to decide that issue.

Allowing the Tenth Circuit decision to stand will distort Free Exercise cases brought under RFRA in the land use arena.

Justice Souter also understands *Lyng* to be a case in which the Court did not apply the compelling interest test. *Church of Lukumi, supra*, 124 L.Ed.2d. 514-515, note 5.

2. Legislative History

The application of *Lyng* by the District Court and the Tenth Circuit is also not in accord with the legislative history of RFRA.

Both the District Court and the Tenth Circuit cited *Lyng* for saying, "This does not and cannot imply that incidental effects of governmental programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Lyng*, *supra*, 108 S.Ct. at 1326.

The legislative history contradicts any language limiting the universe of burdens to coercion:

> [I]n order to violate the statute, government activity need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of rights, benefits and privileges enjoyed by any citizens. Rather, the test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion.

H.R. Rep. 103-88, Religious Freedom Restoration Act of 1993 (H.R. Rep.), at 6 (May 11, 1993) (emphasis added)

The coercion test in determining substantial burden is drawn from *Sherbert* and was quoted by the District Court:

> The pressure upon her to forego [religious] practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. *Thiry v. Carlson*, 887 F.Supp. 1407, 1412 (D.Kan. 1995), *citing*, *Sherbert*, *supra*, 83 S.Ct. at 1794.

In *Sherbert*, the state of South Carolina denied unemployment benefits to an unemployed worker, Adell Sherbert, who refused

available work that included Saturday hours for the reason that Saturday was her Sabbath.

Similarly, by bringing this lawsuit, the Thirys have chosen to follow their precepts and forego the receipt of money paid into the Clerk for compensation for the taking of the land at issue. However, as with Adell Sherbert, this choice can be given meaning only by a decision from this Court favorable to them.

The District Court and the Tenth Circuit both misinterpreted the word "burden" to superimpose a greater meaning than what Congress intended.

The District Court found that, "taking the Thirys's land as proposed by the state would undoubtedly impose a burden on practices related to the Thirys' religious beliefs." *Thiry*, supra, 887 F.Supp. at 1413. The District Court further stated that the taking would be "disruptive and traumatic" for the Thirys. Id., 887 F.Supp at 1415.

The Tenth Circuit found that, the "Thirys establish that they will be both distressed and inconvenienced". *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996) The Thirys submit that to be distressed is to be burdened.

The problem with the conclusions of the District Court and the Tenth Circuit is that the Courts added something to the word "burden" when nothing was intended by Congress. In Senate discussions of the amendment that added the word "substantially," two sponsors of RFRA, Senators Kennedy and Hatch, characterized the addition of the word as a "clarifying amendment" and a "technical amendment" respectively. 139 Cong. Rec. S14352 (daily ed. Oct 26, 1993) Similarly, the House discussions indicate the amendment had a "clarifying" purpose. 139 Cong. Rec. H8714 (daily ed. Nov. 3, 1993) (remarks of Rep. Brooks) Congressional attempts to clarify RFRA should not be read to circumscribe Congress' express intent on this point.

In addition, Congress was specifically outraged by autopsies performed on loved ones in violation of claimants' religious beliefs. See H.R. Rep. 103-88, at 6 n.14 and S. Rep. 103-11, reprinted in U.S.C.C.A.N. 1992, p. 1989, n.13 (both citing *Yang v. Stirmer*, 750 F.Supp. 558 [D. R.I. 1990]). There is very little difference between the autopsy in *Yang* and the disinterment or exhumation of the remains of a deceased person in this case. Both are a violation of the body, soul and spirit of the deceased and of the religious practices of the next of

kin. Disregard for the dead mocks the living.

On a more fundamental legal level, the decisions of the District Court and Tenth Circuit overlook the maxim that a remedial statute should be construed broadly to effectuate its purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336, 88 S.Ct. 548, 553, 19 L.Ed.2d 564 (1967)

One Court has already questioned the interpretation of RFRA in the present case. *Sasnett v. Sullivan*, 908 F.Supp. 1429, 1445 (W.D. Wis. 1995) (comparing rice-throwing as insubstantial with wedding ceremony as substantial)

B. Substantive Due Process

The second main reason for granting this Petition is to address the important constitutional question of which rule will govern cases arising under the Free Exercise Clause of the First Amendment.

The Thirys contend that in this case they fall under the hybrid rights exception established in *Smith* even if this Court does not overturn or modify the *Smith* rule. In this case the hybrid is of the Free Exercise Clause and the substantive aspect of the Due Process Clause of the Fourteenth Amendment.

The Petitioners specifically raise the right of family unity and integrity in the Due Process clause. The factual basis for this right is the burial of Qatlin, the Thirys daughter, the Thirys expressed desire to be buried alongside their daughter where she now lies, and the importance of the gravesite area to the Thirys as their place of worship and prayer.

As the District Court noted, "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation and the right to bodily integrity." *Albright v. Oliver*, _____ U.S. _____, 114 S.Ct. 807, 817, 127 L.Ed.2d 114 (1994)

However, neither the District Court nor the Tenth Circuit placed this case under the coverage of that case law.

The Thirys maintain that the sanctity of their liberty interest under the Due Process Clause is manifested in related public laws and the nature of gravesites.

The Kansas Legislature has expressed the public's interest in

the protection of gravesites with the passage of several statutes, among which are: The Unmarked Burial Sites Preservation Act, K.S.A. 75-2741, et seq.; the cemetery district statutes, K.S.A. 15-1001 et seq.; and the cemetery establishment statutes, K.S.A. 12-1401, et seq.

Additionally, K.S.A. 65-1713b permits a family to bury its own dead, without direction of a licensed funeral director, as long as the death did not result from a contagious, infectious or communicable disease. Religious groups are also permitted to conduct burials under the same circumstances.

Congress has recently expressed a public interest in the protection of American Indian gravesites with the passage of the Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001, et seq.

These expressions of public policy are bottomed on centuries of experience of diverse cultures that have maintained reverence toward deceased persons.

A sampling of these are:

> "Whoever in the open field touches one who has died naturally, or a human bone, or a grave, shall be unclean seven days." Numbers 19:16, New Revised Standard Version Bible (1989) (emphasis added)

> In 1855, Chief Seattle told United States treaty negotiators, "To us the ashes of our ancestors are sacred and their resting place is hallowed ground." Trope and Echo-Hawk, The Native American Graves Protection and Repatriation Act 24 Ariz. St. L.J. 35, 38 (1992)

> Like Jacob of old I too, when I shall be gathered unto my people, desire that they bury me with my feathers in Huron Cemetery, the most sacred and hallowed spot on earth to me, and I cannot believe that this is superstitious reverence any more than I can believe that the reverence every true American has for the grave of Washington at Mount Vernon is a superstitious reverence. Lyda Burton Conley, Argument Presented to the Supreme Court of the

> United States, 1909 (transcribed by Wyandotte County, Kansas Historical Museum) See also, *Conley v. Ballinger*, 216 U.S. 84, 30 S.Ct. 234 (1910)
>
> One who dies physically still lives spiritually in that [s]he has become an inseparable part of the personality systems and the culture of others. What [s]he has done for their thinking and ideals endures as a permanent feature of their lives, as a wave on the sea moves endlessly into other waves. Benson, Religion in Contemporary Culture, p. 807 (1960)

At least one national holiday — Memorial Day — is set aside exclusively for demonstations of reverence toward deceased persons. And western civilization's starting point for counting calendar years is based on the lifespan of one Individual.

These experiences of mankind are part of the spirit of the Thirys and others who respect the sanctity of gravesites. Surely, these sentiments penetrate the serenity of this Court's chambers.

C. Conclusion

Mere words on paper are inadequate to express the full meaning of this gravesite area to the Thirys. It is important that this Court grant this Petition not only to save one child's final resting place, but also other gravesites, and places of worship and prayer, that will otherwise inevitably be at risk in the future.

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APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MARC THIRY, DIANE DE FRIES THIRY, and JOHN D. DE FRIES TRUST,	)	
Plaintiffs - Appellants,	)	
v.	)	No. 95-3178
E. DEAN CARLSON, Kansas Secretary of Transportation; KANSAS STATE DEPARTMENT OF TRANSPORTATION, CITY OF BASEHOR, KANSAS; CITY OF TONGANOXIE, KANSAS and COUNTY OF LEAVENWORTH, KANSAS,	)	
Defendants - Appellees,	)	
UNITED STATES OF AMERICA,	)	
Intervenor.	)	

JUDGMENT
Entered March 15, 1996

Before ANDERSON, McKAY, and JONES,* Circuit Judges

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*Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals, Sixth Circuit, sitting by designation.

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*The Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals, Sixth Circuit, sitting by designation.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Patrick Fisher
Clerk, U.S. Court of
Appeals, Tenth Circuit By
By: _____
Deputy Clerk

Entered for the Court
PATRICK FISHER, Clerk

_____
Deputy Clerk

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MARC THIRY, DIANE DE FRIES THIRY, and JOHN D. DE FRIES TRUST,

Plaintiffs - Appellants,

v.

E. DEAN CARLSON, Kansas Secretary of Transportation; KANSAS STATE DEPARTMENT OF TRANSPORTATION; CITY OF BASEHOR, KANSAS; CITY OF TONGANOXIE, KANSAS; and COUNTY OF LEAVENWORTH, KANSAS,

Defendants - Appellees,

and

UNITED STATES OF AMERICA,

Intervenor.

No. 95-3178

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 94-CV-2425)

Theodore James Lickteig, Lenexa, Kansas, for Plaintiffs-Appellants.

Michael J. Davis, Stinson, Mag & Fizzell, P.C., Kansas City,

Missouri (Michael B. Rees, Office of Chief Counsel, Kansas Department of Transportation, Topeka, Kansas, with him on the brief) for Defendants-Appellees.

Before ANDERSON, McKAY, and JONES,* Circuit Judges.

ANDERSON, Circuit Judge.

The central question in this case is whether the plaintiffs' rights under the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 to -4 ("RFRA"), would be violated if a parcel of their property containing the grave of their stillborn daughter is taken for public highway purposes, necessitating the relocation of the gravesite. Two related questions under 42 U.S.C. § 1983 are whether this condemnation action would violate the plaintiffs' First Amendment right to the free exercise of their religion, and their Fourteenth Amendment substantive due process rights of family unity and integrity. The district court answered these questions in the negative. We agree. The plaintiffs' rights under RFRA will not be violated because, under the facts found by the district court, this taking for public highway purposes will not substantially burden the free exercise of their religion. And, the plaintiffs' First and Fourteenth Amendment rights will not be violated because the taking is part of a neutrally applied project, not directed at the plaintiffs' religion, the effects are incidental, and the plaintiffs can still practice their religion and maintain the integrity of their family despite the relocation of their daughter's gravesite. Accordingly, we affirm the judgment of the district court.

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*The Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals, Sixth Circuit, sitting by designation.

FACTS

The plaintiffs-appellants, Marc and Diane De Fries Thiry, husband and wife, reside on the Stranger Creek Ranch, a 151 acre parcel of property in Tonganoxie, Kansas. The plaintiff-appellant, John D. De Fries Trust (collectively referred to along with the Thirys as "the Thirys"), owns legal title to the property. Diane De Fries Thiry is a beneficiary of the Trust.

The Kansas Department of Transportation ("KDOT") is engaged in a project to improve a portion of U.S. Highway 24, which passes along the edge of the Thiry property. The project design calls for a wider median which will accommodate periodic "turn-around areas" large enough to ensure the safety of vehicles passing through or turning around in those areas. This design requires the acquisition of some adjacent private property, including a four-acre parcel of the Thiry property. The ashes of the Thirys' stillborn baby, Qatlin Soux De Fries Thiry, are buried in this four-acre site, having been placed there in 1993, seven or eight months after the stillbirth. A large quartzite boulder serves as a headstone for the grave. The Thirys placed a three-foot tall wooden cross at the grave sometime after the burial. If the KDOT highway improvement project takes the land containing Qatlin's gravesite, the grave presumably will be moved to another location designated by the Thirys. According to the Thirys, this disturbance and the loss of the existing gravesite will burden their religion. The district court's finding respecting the Thirys' religious beliefs and practices are substantially uncontested on appeal, and, in any event, are not clearly erroneous. We set them out verbatim as follows:

> **The Thirys' Religious Beliefs**
>
> 11. Diane De Fries Thiry is one-thirty-second Delaware Indian. She believes in and practices many tenets of American Indian spirituality which includes beliefs in God as creator, the sanctity of all life, life after death, and the sanctity of gravesites.

12. Diane De Fries Thiry also believes in and practices many tenets of Quakerism and Christianity. These beliefs include baptism by the Holy Spirit rather than by water, peaceable resistance on matters of disagreement, an absence of ritual in worship, a direct relationship with God by an individual without the need for clergy, and sharing of experiences with God in worship services. The Thirys were married in November 1989 at the Stanwood Friends Meeting in McLouth, Kansas, in a Quaker service.

13. Marc Thiry believes in and practices many tenets of Christianity which include observance of a sabbath, or day of rest, the Ten Commandments, God as creator and supreme being, and the existence of sacred places. Marc Thiry also believes in and practices many tenets of American Indian spirituality which include reverence for all things created by God and harmony with other life forms on earth.

14. The area immediately surrounding the red boulder, including the gravesite, is a place which holds special meaning for the Thirys. Diane De Fries Thiry has gone to that area to pray since she was seven years old. The area was also a place of prayer for Marc Thiry prior to his marriage to Diane. The Thirys practice their religious beliefs by visiting the area to be near the spirit of their deceased child and to worship and pray. The Thirys plan to be buried alongside the grave of their child.

15. The Thirys believe that their religious beliefs and practices will continue even if KDOT is allowed to proceed with its condemnation action and construction of the planned highway improvements. The Thirys have in the past prayed, worshipped, and felt a closeness with God at places other than the area around the red boulder.

16. The Thirys have maintained a closeness with the spirit of their daughter continuously since her death, even during the six to seven months before her burial.

> 17. Christian beliefs in the sanctity of burial sites are not violated by moving gravesites when necessary, and moving the gravesites would not be inconsistent with tenets of American Indian spirituality if the Thirys believed it to be necessary. Although a site for prayer and worship is important to Quakers, a basic tenet of Quakerism is that God is within individuals and one particular location is no more or less sacred than another. Despite their beliefs in the sanctity of burial sites, the Thirys would agree to move their child's grave if they believed that it was required in order to build a safe highway.

Memorandum and Order, dated May 8, 1995, at 5-7, R. Vol. I at 183-85.

The district court also reviewed at length the facts concerning the highway project finding, among other things, that "[t]he widened medians are necessary for public safety." Id. at 8, R. Vol. I at 186. The Thirys first became aware of the proposed taking in November 1993, and filed their complaint on October 28, 1994, seeking to enjoin KDOT's condemnation proceedings. The district court entered a temporary restraining order that same day and granted a partial preliminary injunction on December 16, 1994. On May 8, 1995, the district court dissolved the preliminary injunction and entered judgment in favor of KDOT. On June 12, 1995, the ruling to dissolve the preliminary injunction was stayed and the preliminary injunction was reinstated during the pendency of this appeal.

DISCUSSION

I. RFRA

The Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1 to -4, provides in pertinent part as follows:

§ 2000bb-1. Free exercise of religion protected

(a) In general

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> > (1) is in furtherance of a compelling governmental interest;
> > and
> >
> > (2) is the least restrictive means of furthering that compelling governmental interest.

The Act imposes three threshold requirements: the government action must 1) substantially burden 2) a religious belief rather than a philosophy or way of life, 3) which belief is sincerely held by the plaintiff. See id.; Thomas v. Review Bd., 450 U.S. 707, 713-18 (1981); Wisconsin v. Yoder, 406 U.S. 205, 215-19 (1972); Werner v. McCotter, 49 F.3d 1476, 1479 n.1, 1480 (10th Cir.), cert. denied, 115 S. Ct. 2625 (1995). The plaintiff has the burden of proving these requirements by a preponderance of the evidence. See Werner, 49 F.3d at 1480 n.2. On review, the requirements, although largely factual in nature, present mixed questions of fact and law. We review the meaning of the Act de novo, including the definitions as to what constitutes a substantial burden and what constitutes a religious belief, and the ultimate determination as to whether the Act has been violated in either of those respects. Sincerity is a factual matter. As to historical and other underlying factual determinations we defer to the district court, reversing only if the court's findings are clearly erroneous.

There is no dispute in this case over the district court's findings that religious beliefs sincerely held by the Thirys are implicated. The remaining theshold question, then, is whether those beliefs will be substantially burdened by the relocation of their daughter Qatlin's gravesite and use of the present site for public highway purposes.[1]

In a case strikingly similar to the one before us, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988), the Supreme Court established what constitutes a burden on religious beliefs and practices, including traditional Indian religious practices. It stated that the incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on the exercise of religion. Id. At 450-51.[2]

In Werner we said that to exceed RFRA's "substantial burden" threshold, government regulation--

> must significantly inhibit or constrain conduct or expression that manifests some central tenet of . . . [an individual's] beliefs; must meaningfully curtail [an individual's] ability to express adherence to his or her faith; or must deny [an individual] reasonable opportunites to engage in those activities that are

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[1]Although the issue was raised below, the parties raise no issue on appeal as to the constitutionality of RFRA. Cf., Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996) (rejecting the constitutional challenge to RFRA). Accordingly, we confine our analysis to the statute.

[2]The Thirys attempt to distinguish Lyng on the basis that the government in that case was building a highway over public land, while the proposed highway in the instant case will take private land. We are unpersuaded. The Court's analysis in Lyng did not rest on property ownership. Rather, it focused on the nature and extent of the intrusion on religious beliefs and practices as such. Cf. Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981); Grosz v. City of Miami Beach, 721 F.2d 729, 740 (11th Cir. 1983), cert. denied, 469 U.S. 827 (1984); Sequoyah v. Tennessee Valley Auth., 620 F 2d 1159, 1164 (6th Cir.), cert. denied, 449 U.S. 953 (1980).

fundamental to [an individual's] religion.

Werner, 49 F.3d at 1480 (citations omitted).

Werner is a prisoner case, which may explain why we failed entirely to address the Court's "substantial burden" standard in Lyng. The reasoning of Werner, however, is too broad to permit a prisoner/nonprisoner distinction. Regardless, in this case it is unnecessary for us to attempt to harmonize Werner's language with Lyng, or to explore its ramifications, since as the district court found, the Thirys did not carry their burden of proof under any plausible reading of the statute.

While the Thirys establish that they will be both distressed and inconvenienced over the relocation of their daughter's gravesite and loss of access to that particular site itself, they also testified that they will still continue their religious beliefs and practices even if the condemnation proceeds as planned. R. Vol. III at 548-49, 562-64. They concede that they have worshiped, prayed, and drawn near to God in places other than the gravesite area. Id. At 545-58, 563. Furthermore, a basic tenet of Quakerism is that God is within individuals and one particular location is no more or less sacred than another. R. Vol II at 324, 501, 524, 527-28.

The Thirys further testified that they have maintained a continuous closeness with Qatlin's spirit since her death, including the period of more than half a year before her burial at the site in question. R. Vol. III at 549, 560-61. Their American Indian spirituality and Christian beliefs also allow for the moving of gravesites when necessary. R. Vol. II at 324, 331, 506-07, 520. And, despite their belief in the sanctity of burial sites, and this site in particular, the Thirys testified that they would agree to move Qatlin's grave if they believed it was necessary to ensure a safe highway. R. Vol. II at 340, 395-98, 400; R. Vol. III at 563, 565-66.[3]

In sum, after carefully considering all of the Thirys'

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[3]On appeal, the Thirys dispute the necessity of KDOT's proposed highway, contending that the median turn-around area could be located in another place or made narrower to preserve the gravesite. However, because the Thirys failed to prove that they will be substantially burdened, it is unnecessary to address the intricacies of the proposed highway construction.

arguments on appeal, and the record below, we conclude that the district court did not err in its determination that the Thirys rights under RFRA will not be violated by the condemnation in question because the taking will not substantially burden their exercise of religion.

II. SECTION 1983

The Thirys' second claim, brought pursuant to 42 U.S.C. § 1983, argues that KDOT's proposed action violates their rights under the Free Exercise Clause of the First Amendment. In Employment Div., Dept. Of Human Resources v. Smith, 494 U.S. 872 (1990), the Supreme Court held that a law that is religion-neutral and generally applicable does not violate the Free Exercise Clause even if it incidentally affects religious practice. Id. At 878-79; see also Church of the Lukumi Babalu Aye, Inc. V. City of Hialeah, 113 S.Ct. 2217, 2226 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). The Thirys admit that KDOT's proposed actions are neutral and generally applicable and further concede that they are "being treated [no] differently as against other believers because of their faith." Appellants' Br. at 19. We therefore conclude that the Thirys have failed to establish a violation of their rights guaranteed by the Free Exercise Clause of the First Amendment.

The Thirys' final claim, also brought pursuant to § 1983, alleges their substantive due process rights to family unity and integrity, guaranteed by the Fourteenth Amendment, were violated. They attempt to fall within the "hybrid" exception recognized by Smith for cases that involve "the Free Exercise Clause in conjunction with other constitutional protections." Smith, 494 U.S. at 881 & n.1; see also Yoder, 406 U.S. at 232-33 (invalidating a compulsory school attendance law because of the interrelationship between the Amish's belief and daily conduct in the continued survival of Old Order Amish communities and their religious institution). We agree with the district court that nothing which KDOT proposes would preclude the

fulfillment of the Thirys' desire to be buried alongside the grave of their daughter. Accordingly, even assuming arguendo that family unity and integrity are protected as liberty interests under the Fourteenth Amendment, we find no basis for the Thirys' claim that KDOT actions will interfere with these interests.

CONCLUSION

We thus conclude that the Thirys have failed to sustain their burden of establishing a violation under RFRA, the Free Exercise Clause, or the Fourteenth Amendment.

The judgment is accordingly AFFIRMED.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
OFFICE OF THE CLERK
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(303) 844-3157

PATRICK FISHER
CLERK

ELISABETH A SHUMAKER
CHIEF DEPUTY CLERK

April 25, 1996

Mr. Ralph L. DeLoach
Clerk
United States District Court for the District of Kansas
500 State Avenue
628 U.S. Courthouse
Kansas City, KS 66101

Re: 95-3178, Thiry v. Carlson
Dist/Ag docket: 94-CV-2425

Dear Clerk:

In accordance with Fed. R. App. P. 41, I enclose a certified copy of the judgment and a copy of the court's opinion, which constitute the mandate in the subject case. By direction of the court, the mandate shall be filed immediately in the records of the trial court or agency.

The clerk will please acknowledge receipt of this mandate by file stamping and returning the enclosed copy of this letter. Any original record will be forwarded to you at a later date.

Please contact this office if you have questions.

Sincerely,

PATRICK FISHER
Clerk

By:
Deputy Clerk

PF:kc

cc: Theodore James Lickteig
Todd M. Richardson
Christina L. Morris
Katherine W. Hazard
Vicky S. Johnson
Gelene D. Savage
Michael B. Rees
John W. Strahan
Michael J. Davis

B 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARC THIRY, DIANE DE FRIES
THIRY, and the JOHN D. DE FRIES TRUST,
Plaintiffs,

v. Case No. 94-2425-GTV

MICHAEL L. JOHNSTON, Kansas
Secretary of Transportation
and the KANSAS DEPARTMENT
OF TRANSPORTATION,
Defendants.

TEMPORARY RESTRAINING ORDER

The Court has considered the Ex Parte Motion for a Temporary Restraining Order requested by the Plaintiffs against the Defendants pending the hearing on the determination of the Plaintiffs' motion for a preliminary injunction.

On the basis of the pleadings and affidavits submitted by the Plaintiffs it appears to the Court that the Plaintiffs will suffer immediate and irreparable harm before a hearing can be conducted on the Plaintiffs' motion for a preliminary injunction and the Court is of the opinion that a temporary restraining order should be issued.

WHEREFORE, the Defendants, their officers, agents, employees and attorneys and all those in active concert or participation with them are enjoined and restrained from commencing condemnation, Taking, or eminent domain proceedings in any judicial or administrative forum and from commencing construction of the project known to the parties as Project No. 24-52, K4441--01, tract No. 85 as it is presently designed as more fully described in the Plaintiffs' Complaint. Plaintiffs are to give security in the amount of $500.00.

IT IS SO ORDERED.

_____
Judge of the District Court

Approved by:

_____
Theodore J. Lickteig #12977
16 East 13th Street
Lawrence, Kansas 66044
913-842-1133
ATTORNEY FOR PLAINTIFFS

C 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARC THIRY, DIANE DE FRIES THIRY, and the JOHN D. DE FRIES TRUST,	)	
Plaintiffs,	)	
vs.	)	CIVIL ACTION No. 94-2425-GTV
MICHAEL L. JOHNSTON, Kansas Secretary of Transportation, and the KANSAS DEPARTMENT OF TRANSPORTATION,	)	
Defendants.	)	

ORDER

The court held a hearing on December 13 and 14, 1994, to consider plaintiffs' motion for a preliminary injunction (Doc. 3). At the conclusion of the hearing, the court announced its findings and its ruling to grant in part the motion for preliminary injunction. This order will serve to memorialize the court's findings and order.

This case arises out of a proposed highway construction project in Leavenworth County, Kansas. As part of the project, defendants propose to take approximately 4.12 acres of land owned by plaintiff John D. DeFries Trust and in which the plaintiffs Thirys have a possessory interest. Included in this parcel of land is the gravesite containing the remains of the Thiry's stillborn baby. The Thirys allege that this site has a special religious meaning to them and that taking the site for the highway project would substantially burden the practice of their religious beliefs.

Plaintiffs' complaint is set out in three counts. Count I claims that implementation of the planned highway project would substantially burden the Thirys' exercise of religion and would violate their

First Amendment rights. Count I is brought pursuant to the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. Count II states the same claim but is brought pursuant to 42 U.S.C. § 1983. Count III is also brought under § 1983 and claims that the planned project would deprive the Thirys of their right to family unity and integrity, a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment. Plaintiffs' complaint requests only injunctive relief.

Plaintiffs filed their complaint on October 28, 1994. That same day, the court entered a temporary restraining order enjoining defendants from commencing any condemnation, taking, or eminent domain proceedings, and from commencing construction of the highway project described in the complaint. On November 3, 1994, the court granted defendants' request to continue the hearing on plaintiffs' motion for preliminary injunction. Defendants consented to allowing the temporary restraining order to remain in effect until the completion of the hearing.

During the preliminary injunction hearing the court received evidence and testimony from seven witnesses. At the conclusion of the hearing, the court announced its ruling to grant a preliminary injunction conditioned upon an expedited trial, to which the parties agreed. The court also made a number of findings which are set forth below.

1. This case is brought pursuant to provisions of the RFRA and 42 U.S.C. § 1983. The court has jurisdiction, both in personam and of the subject matter.

2. Plaintiffs Marc Thiry and Diane De Fries Thiry are husband and wife. Diane De Fries Thiry is a beneficiary of the John D. DeFries Trust (the Trust), though her interest is not vested. Both plaintiffs have possessory interests in the property involved in this action and they have sufficient interest to bring this action.

3. The Kansas Department of Transportation (KDOT) is a government agency and Michael L. Johnston, Kansas Secretary of Transportation, is properly named as a defendant in his official capacity.

4. KDOT has designed plans to construct a widened median on U.S. 24-40 in Leavenworth County. These plans would require the taking of approximately 4.12 acres of land designated as Tract

No. 85. This parcel is part of a larger tract, title to which is vested in the Trust. The Thirys reside on the property and have a possessory interest.

5. The ashes of the Thirys' stillborn baby are buried within this parcel. The baby was stillborn on August 28, 1992 and cremated. The burial occurred in March or April, 1993.

6. The Thirys' hold a sincerely held emotional attachment to the gravesite. This attachment may involve religious beliefs and the taking of the site may impose a substantial burden on the Thirys' religious observance.

7. KDOT has a compelling governmental interest in making the highway modifications, but the proposed plan may not represent the least restrictive means of furthering that interest.

8. The court concludes that plaintiffs will suffer irreparable harm if a preliminary injunction is not issued, there is a likelihood that the plaintiffs could prevail on the merits, the threatened injury to plaintiffs outweighs whatever damage the preliminary injunction may cause to defendants, and the preliminary injunction will not be adverse to the public interest.

9. The trial of this case will commence on January 19, 1995, at 9:30 a.m.

10. Because of the expedited trial date, no additional bond will be required from plaintiffs.

IT IS, THEREFORE, BY THE COURT ORDERED that plaintiffs' motion for preliminary injunction (Doc. 3) is granted in part. Defendants are restrained and enjoined from taking possession of the property described in this order and from beginning any construction on the property. Defendants may proceed with eminent domain proceedings, but if plaintiffs ultimately prevail in this action defendants must return to plaintiffs any property awarded through such proceedings. As a further condition of the preliminary injunction, if defendants pay into any court money intended as compensation for the taking of this property, plaintiffs may not draw down any of those funds. To do so will result in the dissolution of this injunction.

IT IS FURTHER ORDERED that the defendants' motion to set preliminary injunction bond (Doc. 16) is denied.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 16th day of December, 1994.

G.T. VAN BEBBER

United States District Judge

D 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARC THIRY, DIANE DE FRIES THIRY, and JOHN D. DE FRIES TRUST,	)	
Plaintiffs,	)	CIVIL ACTION
	)	No. 94-2425-GTV
vs.	)	
E. DEAN CARLSON, Kansas Secretary of Transportation, KANSAS STATE DEPARTMENT OF TRANSPORTATION, CITY OF BASEHOR, KANSAS, CITY OF TONGANOXIE, KANSAS, and COUNTY OF LEAVENWORTH, KANSAS,	)	
Defendants.	)	
UNITED STATES OF AMERICA,	)	
Intervenor.	)	

MEMORANDUM AND ORDER

This is an action to enjoin the defendants from condemning certain real estate in Leavenworth County, Kansas, to be used in connection with a highway construction project. The court had previously granted plaintiffs' requests for a temporary restraining order and preliminary injunction. A trial to the court on the merits of the case was then held on March 20-21, 1995. This Memorandum and Order contains the court's findings of fact and conclusions of law made pursuant to Fed. R. Civ. P. 52(a). For the reasons stated herein, the court finds that plaintiffs are not entitled to the injunctive relief sought. Accordingly, the preliminary injunction will be dissolved and

judgment will be entered in favor of defendants.

I. Background

As part of a highway project, defendant Kansas Department of Transportation (KDOT) offered to purchase a 4.12 acre parcel of land which is part of a larger tract owned by plaintiff John D. De Fries Trust (the Trust) and on which the plaintiffs Marc Thiry and Diane De Fries Thiry (the Thirys) reside. The Thirys objected to the project on the grounds that their stillborn baby is buried within the 4.12 acre parcel. The Thirys assert that the gravesite holds spiritual and religious significance for them and is a place of worship and prayer.

In their complaint filed on October 28, 1994, the plaintiffs sought to enjoin defendants from commencing condemnation proceedings and from beginning construction of the highway project. Plaintiffs asserted that KDOT's proposed action violated their rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. Plaintiffs also brought their action under 42 U.S.C. § 1983 and claimed that the highway project would violate their rights of free exercise of religion guaranteed by the First Amendment. Plaintiffs' final claim was also brought under § 1983 and alleged that the planned project would deprive the Thirys of their right to family unity and integrity, a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.

The court entered a temporary restraining order on October 28, 1994. After a continuance was granted at defendants' request, the court held a preliminary injunction hearing on December 12-13, 1994. At the conclusion of the hearing, the court granted in part plaintiffs' motion for preliminary injunction and enjoined defendants from taking possession of the property in question and from commencing any construction on the property. Defendants were, however, permitted to initiate eminent domain proceedings.

Defendants filed a motion to dismiss plaintiffs' RFRA claim on the grounds that RFRA is unconstitutional. The motion remained under advisement at the time of the trial. Because RFRA's constitutionality was challenged, the United States government was permitted to intervene for the purpose of addressing that issue. Further briefing on the question was deferred, however, until after the trial on the mer-

its of the case. Based on the court's finding that the plaintiffs are not entitled to relief under RFRA, the constitutional question need not be addressed.

A trial to the court was held on March 20 and 21, 1995. The record on which the case was submitted to the court includes the testimony and evidence received at both the trial and the preliminary injunction hearing, pursuant to Fed. R. Civ. P. 65 (a) (2). Following are the court's findings of fact and conclusions of law.

II. Findings of Fact

A. Parties

1. Plaintiffs Marc and Diane De Fries Thiry, husband and wife, reside in Tonganoxie, Kansas, on property known as Stranger Creek Ranch.

2. Legal title to the property on which the Thirys reside is held by the John D. De Fries Trust. Diane De Fries Thiry is a beneficiary of the Trust.

3. Defendant E. Dean Carlson is Kansas Secretary of Transportation, and is a defendant in this action in his official capacity only.

4. KDOT is an agency of the State of Kansas. The cities of Basehor and Tonganoxie and the County of Leavenworth are all political subdivisions of the State of Kansas.

5. Intervenor United States of America contends that the RFRA, 42 U.S.C. §§ 2000bb et seq., is constitutional, and has intervened in this action for the sole purpose of addressing that issue. The United States took no part in the preliminary injunction hearing or in the trial.

B. The Property

6. The Thirys reside on a 151-acre tract in Leavenworth County, Kansas, which is owned by the Trust.

7. KDOT has designed highway improvement plans which include constructing a "turnaround", or wider median, on a portion of U.S. Highway 24 which adjoins the property on which the Thirys

reside.

8. In order to widen the highway, KDOT has proposed taking a 4-acre parcel of land which is located on the Southeast portion of the property on which the Thirys reside. The Thirys first became aware of this proposed taking in November 1993.

9. Included within this 4-acre parcel is a gravesite where the remains of the Thirys' stillborn baby, Qatlin Soux De Fries Thiry, are buried. The stillbirth occurred on August 28, 1992, the remains were cremated, and the burial took place in March or April, 1993.

10. A large, red quartzite boulder serves as the headstone for the grave. The Thirys later placed a wooden cross about three feet tall at the gravesite.

C. The Thirys' Religious Beliefs

11. Diane De Fries Thiry is one-thirty-second Delaware Indian. She believes in and practices many tenets of American Indian spirituality which include beliefs in a God as creator, the sanctity of all life, life after death, and the sanctity of gravesites.

12. Diane De Fries Thiry also believes in and practices many tenets of Quakerism and Christianity. These beliefs include baptism by the Holy Spirit rather than by water, peaceable resistance on matters of disagreement, an absence of ritual in worship, a direct relationship with God by an individual without the need for clergy, and sharing of experiences with God in worship services. The Thirys were married in November 1989 at the Stanwood Friends Meeting in McLouth, Kansas, in a Quaker service.

13. Marc Thiry believes in and practices many tenets of Christianity which include observance of a sabbath, or day of rest, the Ten Commandments, God as creator and supreme being, and the existence of sacred places. Marc Thiry also believes in and practices many tenets of American Indian spirituality which include reverence for all things created by God and harmony with other life forms on earth.

14. The area immediately surrounding the red boulder, including the gravesite, is a place which holds special meaning for the Thirys. Diane De Fries Thiry has gone to that area to pray since she was seven years old. The area was also a place of prayer for Marc

Thiry prior to his marriage to Diane. The Thirys practice their religious beliefs by visiting the area to be near the spirit of their deceased child and to worship and pray. The Thirys plan to be buried alongside the grave of their child.

15. The Thirys believe that their religious beliefs and practices will continue even if KDOT is allowed to proceed with its condemnation action and construction of the planned highway improvements. The Thirys have in the past prayed, worshiped, and felt a closeness with God at places other than the area around the red boulder.

16. The Thirys have maintained a closeness with the spirit of their daughter continuously since her death, even during the six to seven months before her burial.

17. Christian beliefs in the sanctity of burial sites are not violated by moving gravesites when necessary, and moving the gravesite would not be inconsistent with tenets of American Indian spirituality if the Thirys believed it to be necessary. Although a site for prayer and worship is important to Quakers, a basic tenet of Quakerism is that God is within individuals and one particular location is no more or less sacred than another. Despite their beliefs in the sanctity of burial sites, the Thirys would agree to move their child's grave if they believed that it was required in order to build a safe highway.

D. The Highway Project

18. The highway project at issue in this case is part of a state-wide program to upgrade safety on Kansas highways and promote economic development. The program was enacted by the Kansas Legislature in 1989.

19. The project includes improving U.S. Highway 24 between Tonganoxie and Basehor by constructing a four-lane limited access highway in place of the current two-lane highway. Approximately $30 million has been invested in this project.

20. On November 18, 1991, the cities of Basehor and Tonganoxie and the County of Leavenworth entered into an agreement with then Kansas Secretary of Transportation, Michael L. Johnston, related to the highway project. Under the agreement, the Secretary completes the project on behalf of the local governments

and acts as their agent in all matters related to the project.

21. Currently, U.S. Highway 24 between Tonganoxie and Basehor is a two-lane, two-way highway. At the time it was constructed, provisions were made to eventually add two lanes on the north side of the highway, and rights of way were acquired for that purpose. When the project to improve the highway was undertaken, the initial design used the existing right of way and provided for a narrow median. In order to provide greater access for local landowners, KDOT modified the initial design to provide for turnaround areas through the median which would allow vehicles to make left turns and U-turns. Because of the presence of farm equipment, horse trailers, and semi trucks, the decision was made to widen the median at those turnaround points to 150 feet. The widened medians are necessary for public safety.

22. Under the modified design, three 150-foot medians are planned along the portion of the highway between Basehor and Tonganoxie. These turnarounds are spaced approximately two miles apart which KDOT engineers believe to be the maximum distance that drivers are willing to travel to reach a turnaround. One of those 150-foot medians is planned at the intersection of 198th Street. This widened median will require additional right of way which KDOT proposes to acquire from the Thiry property on the north side of the highway.

23. The 150-foot wide medians are desirable because they allow multiple vehicles to use the median simultaneously while waiting to complete their turns. In addition, semi-trailer trucks, buses, and other truck-trailer combinations are able to fully fit within the median while waiting to turn. This makes it less likely that vehicles waiting to turn will block traffic lanes or will block access from the median to vehicles turning in the opposite direction. Finally, the wider median makes it possible for larger vehicles to safely complete U-turns.

24. After receiving objections from the Thirys, KDOT considered alternatives to the planned placement of the 150-foot median. One alternative was to construct a 90-foot median. The narrower median would result in cost savings of $300-400,000.00. The primary disadvantage to the 90-foot median is that it provides less storage for turning vehicles. In addition, it is not clear from the record

how much additional right of way would be needed for a 90-foot median and whether the gravesite would be affected.

25. The second alternative was to acquire the additional right of way from property owners on the south side of the highway. KDOT rejected this option because it would affect eight landowners rather than just one, and because the residences on the south side were located fairly close to the highway. This option would result in a cost savings of approximately $50,000.00.

26. The final alternative that KDOT considered was to move the turnaround approximately one mile west. The primary disadvantage to this alternative is that the two-mile spacing would be disrupted and some drivers would be forced to travel a longer distance. In addition, this alternative would increase costs by about $700,000.00.

III. Conclusions of Law

A. RFRA Claim

Under RFRA, the government "may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). In applying this strict scrutiny test courts are to look to Free Exercise Clause decisions of the Supreme Court prior to its decision in Employment Division v. Smith, 494 U.S. 872 (1990). 42 U.S.C. § 2000bb(a). RFRA defines a statutory, if not constitutional, right to the free exercise of religion which incorporates the compelling interest test set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972). See Werner v. McCotter, ___ F. 3d ____, 1995 WL 107386, No. 94-4130 (10th Cir., March 14, 1995); 42 U.S.C. § 2000bb(b)(1).

In Werner, the Tenth Circuit held that in order to state a prima facie claim under RFRA, a plaintiff must make the same two threshold showings as required under Yoder for free exercise claims. See Werner, 1995 WL 107386 at *2 n.1. First, the governmental action must burden a religious belief rather than a philosophy or a way of life. Yoder, 406 U.S. at 215-19. Second, the plaintiff's belief must be

sincerely held. Id. In this case, the court finds the Thirys' testimony regarding their beliefs to be credible, and concludes that the beliefs that would be burdened by KDOT's actions are religious in nature and sincerely held by the Thirys.

Having made these threshold showings, plaintiffs have the burden of proving that the governmental action would substantially burden the exercise of their religion. Werner, 1995 WL 107386 at *2, n.2 (citing Bryant v. Gomez, 46 F.3d 948, 949 (9th Cir. 1995)). The burden then shifts to the government to demonstrate that the challenged action furthers a compelling state interest in the least restrictive manner. 42 U.S.C. § 2000bb-1(b).

While RFRA indicates that its prohibition extends only to governmental actions that "substantially burden" the exercise of religion, it fails to define either the term "burden" or its modifier "substantially." Instead, Congress apparently intended courts to look to existing case law to construe the phrase. See S. Rep. No. 111, 103d Cong. 1st Sess.8 (1993), reprinted in 1993 U.S.C.C.A.N. 1892, 1898 ("The committee expects that the courts will look to free exercise cases decided prior to Smith for guidance in determining whether the exercise of religion has been substantially burdened.").

In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist who observed a Saturday Sabbath lost her job when she refused to work on Saturdays. Id. at 399. A state agency then denied her unemployment benefits because it found that she had failed to accept suitable work when it was offered. Id. at 400-01. In holding for the claimant, the Court found that the state had placed a burden on her free exercise of religion.

> [T]he pressure upon her to forego [religious] practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against an appellant for her Saturday worship.

Id. at 404. Not every burden imposed by government, however, is substantial enough to force the government to prove that its action is taken in furtherance of a compelling government interest and in the least restrictive manner. In Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988), the Court held that the incidental effects of otherwise lawful government programs "which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not constitute substantial burdens on the exercise of religion.

In Lyng, the Court found no substantial burden on Native Americans who objected to the construction of a timber road through a traditional religious site which was located on federal land. The Court reached this conclusion even though it assumed that "the threat to the efficacy of at least some religious practices is extremely grave." 485 U.S. at 451. Evidence in the case included a study which concluded that the proposed road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of Northwest California Indian peoples." Id. at 442 (quoting study). The Court nevertheless found that burdens on free exercise could not result from acts of government which neither "coerced" individuals "into violating their religious beliefs" nor denied them "an equal share of the rights, benefits, and privileges enjoyed by other citizens." Id. at 449.

In this case, taking the Thirys' land as proposed by the state would undoubtedly impose a burden on practices related to the Thirys' religious beliefs. That burden, however, is not so substantial as to give rise to a claim under RFRA. The gravesite and the area immediately surrounding it is a place which holds special meaning for the Thirys. They practice their religious beliefs by visiting the area to be near the spirit of their deceased child and to worship and pray. The Thirys testified, however, that their religious beliefs and practices will continue even if the planned highway is constructed. They also acknowledged that they have prayed and worshipped at other locations. Finally, while the Thirys profess a belief in the sanctity of burial sites, they have pointed to no religious belief or tenet that would forbid in all situations the moving of a gravesite. Under the standard set forth by the Supreme Court in Lyng, this court concludes that the action

proposed by KDOT in this case would not impose a substantial burden on the Thirys exercise of their religion.

Plaintiffs contend that the facts in Lyng can be distinguished from the facts in this case in that the controversy in Lyng involved the use of land already owned by the federal government, and not the taking of privately owned land. This distinction is of some importance. The Lyng Court noted that "[w]hatever rights the Indians may have to use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land." 485 U.S. at 453. Further, the Lyng opinion specifically adopted the reasoning of an earlier case which stands for the proposition that the government need not establish a compelling interest when its action involves only management of internal government affairs. See id. at 448-49 (discussing Bowen v. Roy, 476, U.S. 693 (1986) which rejected a claim that a federal statute requiring the use of Social security numbers in administering certain welfare programs was subject to strict scrutiny when challenged by welfare applicants who claimed that use of a numerical identifier for their daughter would violate their religious beliefs.)

After reviewing the Lyng opinion, however, this court concludes that the outcome was not based on the fact that the property at issue was owned by the government. Instead, the Court focused much of its discussion on the nature of the government action and the effects that action would have on the individuals' religious beliefs and practices. In a similar case, the Tenth Circuit held that ownership of the property in question was not determinative in a free exercise claim. See Badoni v. Higginson, 638 F.2d 172, 176 (10th Cir. 1980), cert. denied, 452 U.S. 954 (1981). In Badoni, the Tenth Circuit held that the government must manage its property in a manner consistent with the Constitution and that courts must look to the government's action and the plaintiff's position to determine whether a free exercise claim is stated. Id. (citing Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1164 (6th Cir.), cert. denied, 449 U.S. 953 (1980); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Finally, a number of courts have upheld zoning regulations which imposed restrictions on privately owned church property. See Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 823-26 (10th Cir. 1988) (zoning ordinance which precluded church from building in agricultural zone im-

posed no impermissible burden on religion), cert. denied, 490 U.S. 1005 (1989); Rector, Wardens, and Members of Vestry of St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353-55 (2d Cir. 1990) (holding that Landmarks Preservation Law imposed no unconstitutional burden on free exercise of religion), cert. denied, 499 U.S. 905 (1991); Lakewood Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303, 307-08 (6th Cir.) (holding that zoning ordinance which prohibited church buildings in certain area did not infringe on religious freedom), cert. denied, 464 U.S. 815 (1983).

The court concludes that plaintiffs have not established that the defendants' proposed action would substantially burden the Thirys' exercise of their religion. As a result, it is not necessary to determine whether the proposed action is in furtherance of a compelling government interest and whether it is the least restrictive means of furthering that interest. Because the court has concluded that plaintiffs do not state a claim for relief under RFRA, it is also unnecessary to address defendants' claim that the statute is unconstitutional. See American Foreign Service Ass'n v. Garfinkel, 490 U.S. 153, 161 (1989) (Especially in cases implicating a fundamental relationship between branches of government, "courts should be extremely careful not to issue unnecessary constitutional rulings.")

B. First Amendment Claim

Plaintiffs second claim, brought pursuant to 42 U.S.C. 1983, alleges that defendants' proposed action violates plaintiff's right of free exercise of religion under the First and Fourteenth Amendments. In bringing this claim, plaintiffs contend that defendants' proposed action violates current Supreme Court standards for free exercise claims as articulated in Employment Division v. Smith, 494 U.S. 872 (1990).

The Smith Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Smith, 494 U.S. at 879. If the law is "generally applicable," the government need not show that it serves an important (let

alone compelling) purpose, even if its effect substantially burdens the practice of religion. Id. at 885.

In this case, plaintiffs have failed to show that the laws under which the state derives its authority to take the proposed action--laws granting condemnation authority--are anything but neutral laws of general applicability. There is no evidence whatsoever that the relevant laws are in any way intended to target religious activity. Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) (striking down city ordinance restricting ritual slaughter of animals on grounds that ordinance specifically targeted religious practice and failed to meet strict scrutiny standard.)

The Smith Court also noted that earlier cases had applied the compelling interest test when the government regulation at issue burdened a separate constitutional right in addition to free exercise. See id. at 881-82. Plaintiffs argue that defendants' proposed action interferes with their substantive due process right to family unity and integrity, along with their free exercise right. However, analysis of this claim reveals that it is not valid and that the "hybrid rights" exception does not apply here. As explained below, plaintiffs have presented no evidence to support their substantive due process claim. As a result, there is no basis for applying the compelling interest test to defendants' actions under the principles set forth in Smith.

The court concludes that plaintiffs have failed to establish any violation of their rights guaranteed by the Free Exercise Clause of the First Amendment.

C. Due Process Claim

Plaintiffs' final claim is also brought pursuant to 42 U.S.C. § 1983 and alleges that defendants' project would deprive plaintiffs of their right to family unity and integrity, a substantive due process right guaranteed by the Fourteenth Amendment. "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity." Albright v. Oliver, 114 S. Ct. 807, 812, (1994). Supreme Court precedent has "'respected the private realm of family life in which the state cannot enter.' These matters, involving the most intimate and personal choices a person may make in a lifetime, choices

central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791, 2807 (1992) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)).

Assuming that the rights encompassed by the protections of substantive due process include a right to family unity, the court finds that plaintiffs have failed to present evidence that defendants' proposed actions will infringe on that right. The court accepts the Thirys' assertion that they wish to be buried alongside the grave of their daughter, but nothing that the defendants propose would preclude that. The court is simply unable to discern any basis for the claim that defendants' actions will interfere with the Thirys' family unity.

IV. Conclusion

While the court is fully aware that the taking of this land for a highway project will be disruptive and traumatic for the Thirys, there is simply no recourse under federal statutes or the Constitution. While RFRA imposes important restrictions on governmental actions that affect religion, it does so only for those actions which substantially burden one's exercise of religion. Under the facts presented in this case, the court concludes that the government's action will not substantially burden the Thirys' religious beliefs and practices.

Rights guaranteed under the Free Exercise Clause of the First Amendment, independent of RFRA, generally do not serve to restrict governmental actions that are based on valid and neutral laws of general applicability, as are the proposed actions in this case.

Finally, plaintiffs have failed to establish that the proposed action will in any way impair rights related to family unity guaranteed by the Due Process Clause of the Fourteenth Amendment.

IT IS THEREFORE, BY THE COURT ORDERED that the preliminary injunction entered on December 14, 1994, is dissolved.

IT IS FURTHER ORDERED that the clerk of the court shall enter judgment in favor of the defendants.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 5th day of May, 1995.

_____

G.T. VAN BEBBER

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARC THIRY, DIANE DE FRIES THIRY, and JOHN D. DE FRIES THIRY TRUST,	)
Plaintiffs,	)
vs.	) CIVIL ACTION)No. 94-2425-GTV
E. DEAN CARLSON, Kansas Secretary of Transportation, KANSAS STATE DEPARTMENT OF TRANSPORTATION, CITY OF BASEHOR, KANSAS, CITY OF TONGANOXIE, KANSAS, and COUNTY OF LEAVENWORTH, KANSAS,	)
Defendants.	)
UNITED STATES OF AMERICA, Intervenor.	)

MEMORANDUM AND ORDER

This case is before the court on plaintiffs' motion for stay pending appeal, pursuant to Fed. R. Civ. P. 62 (c) (Doc. 71). For the reasons set forth in this Memorandum and Order, the motion is granted.

I. Background

This is an action to enjoin the defendants from condemning certain real estate in Leavenworth County, Kansas, to be used in connection with a highway construction project. Defendant Kansas Department of Transportation (KDOT) offered to purchase the 4.12 acre parcel of land which is part of a larger tract owned by plaintiff John D. De Fries Trust (the Trust) and on which plaintiffs Marc Thiry and Diane De Fries Thiry (the Thirys) reside. The Thirys objected to the

project on the grounds that their stillborn baby is buried within the 4.12 acre parcel. The Thirys assert that the gravesite holds spiritual and religious significance for them and is a place of worship and prayer.

In their complaint, the plaintiffs sought to enjoin defendants from commencing condemnation proceedings and from beginning construction of the highway project. Plaintiffs asserted that KDOT's proposed action violated their rights under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb et seq. Plaintiffs also brought their action under 42 U.S.C. § 1983 and claimed that the highway project would violate their rights of free exercise of religion guaranteed by the First Amendment. Plaintiffs' final claim was also brought under § 1983 and alleged that the planned project would deprive the Thirys of their right to family unity and integrity, a liberty interest guaranteed by the Due Process Clause of the Fourteenth Amendment.

The court entered a temporary restraining order on October 28, 1994. After a continuance was granted at defendants' request, the court held a preliminary injunction hearing on December 12-13, 1994. At the conclusion of the hearing, the court granted in part plaintiffs' motion for preliminary injunction and enjoined defendants from taking possession of the property in question and from commencing any construction on the property. Defendants were, however, permitted to initiate eminent domain proceedings.

After a trial to the court on the merits, the court entered a Memorandum and Order containing its findings of fact and conclusions of law on May 8, 1995. The court concluded that plaintiffs had failed to establish their claim for relief and ordered that the preliminary injunction be dissolved. Judgment in favor of the defendants was entered on May 8, 1995. Plaintiffs have filed a notice of appeal and a motion requesting the court to reinstate the preliminary injunction during pendency of the appeal. Defendants oppose the motion and request that plaintiffs be required to post a bond in the amount of $1,507,584.00 if the motion is granted.

II. Injunction Pending Appeal

Defendants assert that the highway project at issue in this case is scheduled for a February 1996 construction letting. In ad-

vance of the letting, condemnation must be completed, construction staking done, and utility lines relocated. Condemnation is scheduled to be completed by June 30, 1995, and construction staking can be completed within 2 to 3 weeks later. KDOT has indicated that it will begin utility relocation immediately thereafter. Utility relocation must be done prior to letting because one of the first activities on the project will require excavation in areas where utilities are currently located. According to KDOT, utility relocation will take at least four months to complete and substantially longer if done during the winter. Utility relocation will effectively destroy the gravesite area. Part of the utility relocation involves the relocation of a fiber optic line which cannot be done piecemeal because of the high cost of splices. Plans call for the fiber optic line to be relocated to a point between 70 and 80 feet north of the gravesite on the Thiry property.

The court has discretion to "suspend, modify, restore, or grant" an injunction during the pendency of an appeal from a judgment granting or denying an injunction. Fed. R. Civ. P. 62(c). In determining whether to restore the preliminary injunction in this case, the court will consider the following factors: (1) the likelihood that plaintiffs will prevail on appeal; (2) the threat of irreparable harm that would be suffered by plaintiffs if the injunction is not granted; (3) the harm that would be suffered by defendants if the injunction is granted; and (4) any harm to the public interest. See Securities Investor Protection Corp. v. Blinder, Robinson & Co., Inc., 962 F.2d 960, 968 (10th Cir. 1992); National Indian Youth Council v. Andrus, 623 F.2d 694, 695 (10th Cir. 1980); Hellebust v. Brownback, 824 F. Supp. 1524, 1530 (D. Kan. 1993), aff'd, 42 F.3d 1331 (10th Cir. 1994); see also 10th Cir. R. 8.1 (requiring applicant for stay or injunction to address same factors).

The court is unable to find that plaintiffs have a substantial likelihood of success on their appeal. A major component of plaintiffs' case was the contention that the state's action would violate plaintiffs' rights as guaranteed by RFRA, a relatively new statute. While the precise boundaries of RFRA are not yet clearly defined by case law, the court's decision in this case rested on a finding that plaintiffs had not established the threshold requirement of showing that the state's proposed action would "substantially burden" their exercise of religion. The "substantial burden" requirement in RFRA

is not new, but rather a concept adopted from the earlier case law. The court believes its ruling in this case necessarily follows from applying the facts to applicable Supreme Court precedent.

While finding that the plaintiffs have not made a strong showing of likelihood of success on the merits, the court also recognizes that this case involves substantial legal questions in an area of the law that continues to evolve. More importantly, plaintiffs have shown that they will be irreparably injured by the lack of an injunction, and that their injury will substantially outweigh that suffered by defendants if an injunction is issued. A number of courts have held that when equitable factors strongly favor interim relief, the court "is not required to find that ultimate success by the movant is a mathematical probability" and "may grant a stay even though its own approach may be contrary to movant's view of the merits." Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); see also Standard Havens Products, Inc. v. Gencor Indus., Inc., 897 F.2d 511, 512 (Fed. Cir. 1990) ("[L]ikelihood of success in the appeal is not a rigid concept."); Ruiz v. Estelle, 650 F.2d 555, 565 (5th Cir. 1981) ("[M]ovant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay."); Providence Journal Co. v. Federal Bureau of Investigation, 595 F.2d 889, 890 (1st Cir. 1979) (If "denial of a stay will utterly destroy the status quo, irreparably harming appellants, but the granting of a stay will cause relatively slight harm to appellee, appellants need not show an absolute probability of success in order to be entitled to a stay.").

In this case, a weighing of the relative harm strongly supports granting an injunction pending appeal. If this court does not grant an injunction pending appeal, the gravesite and place of worship will be eliminated, and restoration will likely be impossible. In the event that this court incorrectly denied plaintiffs' action for a permanent injunction, plaintiffs will irretrievably lose rights guaranteed by the First Amendment. "The loss of First Amendment freedoms for even minimal periods of time unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); see also Dayton Christian Schools v. Ohio Civil Rights Comm'n, 604 F. Supp. 101 (S.D. Ohio 1984) (granting injunction pending appeal in case involving alleged

violation of rights guaranteed by First Amendment religion clauses), rev'd on other grounds, 766 F.2d 932 (6th Cir. 1985). Plaintiffs have therefore made a strong showing that they will suffer irreparable harm without an injunction.

If the court grants the requested injunction, it is possible that the defendants will suffer some harm in the form of increased costs to complete the project. While the defendants claim that they will incur substantial losses if an injunction causes delays in the highway project, the court is not persuaded that the damages will be significant. As explained in the discussion of a bond requirement, the defendants' damages are speculative at this point. The court concludes that any losses defendants will suffer as a result of an injunction are not substantial when compared to the potential harm which confronts the plaintiffs.

Finally, the court finds that the public interest will not be adversely affected by issuing an injunction pending appeal. Defendants contend that the public interest will be harmed by delaying the highway project which is part of a state-wide program, authorized by the Kansas Legislature, to upgrade highway safety and promote economic development. The facts show, however, that any additional delay caused by the pendency of this appeal is less than the delays already experienced due to reasons unrelated to this litigation. In addition, the public interest cuts both ways. The public has at least an equal interest in insuring that the rights and values embodied in the Free Exercise Clause of the First Amendment are protected. The legal questions presented in this case, relating to the proper accommodations the state must make when confronted with claimed infringement of religious liberties, are questions of importance to the public. Granting an injunction will provide plaintiffs with an effective right to appeal and will assure that a higher court will consider and review these important issues. See Dayton Christian Schools, 604 F. Supp. at 104-05.

The court has applied the four factors cited above and concludes that the status quo should be maintained by restoring the preliminary injunction previously entered in this case. Plaintiffs have shown that serious legal questions are presented in this case. Failure to grant an injunction will entirely destroy the rights plaintiffs seek to have protected, and will effectively deny them their right to appellate

review. On the other hand, the granting of an injunction will be detrimental to defendants only to the extent that it postpones the start of the highway project by whatever time may be required to hear and decide the appeal. Weighing this latter hardship against the total and immediate divestiture of plaintiffs' rights to have effective appellate review, the court finds that the balance of hardship favors the issuance of an injunction. Finally, on balance the interests of the public will not be adversely affected by the issuance of an injunction.

III. Bond Requirement

The court has discretion to restore or grant an injunction pending appeal "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Fed. R. Civ. P. 62(c). Defendants contend that if an injunction is granted and defendants ultimately prevail on appeal, they will have suffered damages in the amount of $1,507,584.00. Defendants argue that plaintiffs should be required to post a bond in that amount if the court grants plaintiffs' motion.

Defendants' calculation of potential damages is based on the premise that the cost of the highway project will increase by 5.2% if the letting date is delayed until the state's next fiscal year, i.e., on or after July 1, 1996. Defendants contend that an injunction would necessarily delay the entire project, and that the current project cost estimate is $28,992,000.00. Applying the 5.2% increased cost factor to the project's estimated cost yields an additional estimated cost of $1,507,584.00.

The court finds that damages in the form of increased costs are at this point speculative. The court has made no finding as to the accuracy of the 5.2% cost factor, but even if that figure is accurate, the court cannot conclude that an injunction pending appeal will necessarily delay letting into the next fiscal year. Defendants are free to request that the Tenth Circuit expedite review of this case, and if expedited review is granted it is unlikely that the appeals process will cause further delays.

Even if the project is delayed into the start of the next fiscal year, it is speculative to attribute that delay solely to the appeal. This project is part of a state-wide highway improvement program enacted

by the Kansas Legislature in 1989. The local governments affected by the project first committed funds to help pay for the project in 1989, and entered into an agreement for completion of the project with the Kansas Secretary of Transportation in November 1991. The letting date, now scheduled for over four years after that agreement was entered, has in no way been delayed by the pendency of this litigation or the temporary restraining order and preliminary injunction previously issued in this case. Even while this suit was pending the scheduled letting date was postponed for reasons unrelated to the litigation.

Finally, defendants bear some responsibility for delays in getting to this point in the litigation. The court twice granted continuances in this case at defendants' request. The preliminary injunction hearing was postponed from November 4, 1994, to December 9, 1994, and finally held on December 14, 1994. The trial originally scheduled to begin January 19, 1995, was also continued at the request of defendants until March 20, 1995.

For these reasons, the court finds that the harm defendants may incur due to the issuance of an injunction pending appeal is sufficiently speculative that plaintiffs will not be required to post bond.

IT IS, THEREFORE, BY THE COURT ORDERED that the plaintiffs' motion for stay pending appeal (Doc. 71) is granted. The preliminary injunction entered in this case on December 14, 1994, is restored and will remain in effect until disposition of the appeal now pending before the United States Court of Appeals for the Tenth Circuit. Plaintiffs are not required to post bond or other security.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 9th day of June, 1995.

G.T. VAN BEBBER
United States District Judge

F 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DE FRIES TRUST,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	No. 95-3178
	)	
E. DEAN CARLSON, Kansas Secretary of Transportation, KANSAS STATE DEPARTMENT OF TRANSPORTATION, CITY OF BASEHOR, KANSAS, CITY OF TONGANOXIE, KANSAS, and COUNTY OF LEAVENWORTH, KANSAS,	)	
	)	
Defendants-Appellees,	)	
----------	)	
UNITED STATES OF AMERICA	)	
Intervenor.	)	

ORDER
Entered April 17, 1996

Before ANDERSON, McKAY, and JONES, * Circuit Judges.

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*The Honorable Nathaniel R. Jones, Senior Circuit Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

This matter comes on for consideration of appellants' petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is de-

nied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court
PATRICK FISHER, Clerk

By_____
Deputy Clerk

PUBLIC LAW 103-141 [H.R. 1308]; November 16, 1993

RELIGIOUS FREEDOM RESTORATION ACT OF 1993

An Act to protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Religious Freedom Restoration Act of 1993, 42 USC 2000bb note.

SECTION 1. SHORT TITLE

This Act may be cited as the "Religious Freedom Restoration Act of 1993".

42 USC 2000bb.

SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.

(a) FINDINGS.--The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) PURPOSES.--The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application

in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 USC 2000bb-1.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) IN GENERAL.--Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) EXCEPTION.--Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) JUDICIAL RELIEF.--A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

SEC. 4. ATTORNEYS FEES.

(a) JUDICIAL PROCEEDINGS.--Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting "the Religious Freedom Restoration Act of 1993," before "or title VI of the Civil Rights Act of 1964".

(b) ADMINISTRATIVE PROCEEDINGS.--Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking "and" at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ",and"; and

(3) by inserting "(iv) the Religious Freedom Restoration Act of 1993;" after clause (iii).

42 USC 2000bb-2.
SEC. 5. DEFINITIONS.

As used in this Act--

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State.

(2) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States.

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means the exercise of religion under the First Amendment to the Constitution.

42 USC 2000bb-3.
SEC. 6. APPLICABILITY.

(a) IN GENERAL. -- This Act applies to all Federal and Sate law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act.

(b) RULE OF CONSTRUCTION. -- Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

(c) RELIGIOUS BELIEF UNAFFECTED. -- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

42 USC 2000bb-4
SEC. 7: ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as

the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Approved November 16, 1993.

Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-2022

In The
Supreme Court of the United States
October Term, 1995

MARC THRIY, et al.,
Petitioners,

v.

E. DEAN CARLSON, et al.,
Respondents,
and
UNITED STATES OF AMERICA
Intervenor.

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the fact-based determination of two lower federal courts that Petitioners failed to establish that relocation of a gravesite will "substantially burden" their religious beliefs and practices under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-1 — 2000bb-4.

2. Whether these courts properly defined "substantially burden" when they employed a test that was first articulated by this Court in a very similar case and was left untouched by the Congress when it passed RFRA.

3. Whether a state government's condemnation of property under procedures admittedly neutral and of general application violated Petitioners' first and fourteenth amendment "hybrid" rights by denying them the opportunity to be buried next to their daughter at the former location of her gravesite.

4. Whether Petitioners' request for an injunction has become moot if the activities they sought to stop have lawfully occurred.

PARTIES

PETITIONERS:	Marc Thiry, Diane De Fries Thiry, and The John D. De Fries Trust
RESPONDENTS:	E. Dean Carlson, Kansas Secretary of Transportation, Kansas Department of Transportation, City of Basehor, Kansas, City of Tonganoxie, Kansas, County of Leavenworth, Kansas
INTERVENOR:	United States of America

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

In addition to the official and unofficial reports cited in the Petition, the full court record includes:

SUPREME COURT:

Thiry v. Carlson, No. 95-2022 (U.S. May 17, 1996) (Order denying Petitioners' application for a stay).

TENTH CIRCUIT:

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (Tenth Circuit decision affirming the District Court).

De Fries Trust v. Carlson, No. 95-3178 (10th Cir. April 17, 1996) (Tenth Circuit Order denying Petition for Rehearing).

De Fries Trust v. Carlson, No. 95-3178 (10th Cir. April 17, 1996) (Order denying stay of mandate).

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Thiry v. Johnston, No. 94-2425 (D. Kan. Oct. 29, 1994) (Temporary Restraining Order).

Thiry v. Johnston, No. 94-2425 (D. Kan. Dec. 14, 1994) (Preliminary Injunction Order).

Thiry v. Carlson, 887 F. Supp. 1407 (D. Kan. 1995) (District Court's decision on the merits).

Thiry v. Carlson, 891 F. Supp. 563 (D. Kan. 1995) (Order granting Petitioners' motion for stay pending appeal and restoring

the preliminary injunction entered Dec. 14, 1994, pending appeal to the Tenth Circuit).

Thiry v. Johnston, No. 94-2425 (D. Kan. filed July 3, 1996) (Order denying plaintiffs' motion to enforce injunction pending appeal).

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Carlson v. The John D. De Fries Trust, No. 9412 CV 00679 (District Court of Leavenworth County, Kansas, May 10, 1995) (Order Approving Petition and Appointing Appraisers to determine damages).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. CONST. amend. XIV, § 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1--2000bb-4 (1993):

The full text of this act is included in the appendix of the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents E. Dean Carlson, et al. respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

A. Background

Petitioners Marc and Diane De Fries Thiry, husband and wife, reside on a 151-acre parcel of land in Tonganoxie, Kansas, owned by Petitioner John D. De Fries Trust. As part of a state-wide safety improvement program the Kansas Department of Transportation ("KDOT")[1] offered to purchase a 4.12 acre tract of the Petitioners' land to improve U.S. Highway 24 between Tonganoxie and Basehor, Kansas by constructing a four-lane limited access highway in place of the current two-lane road.

For public safety reasons, and in order to provide greater access for local landowners, KDOT designed 150-foot "turnarounds" — extra wide medians — every two miles along the new highway. The basic purpose of the turnarounds is to per-

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[1] The City of Basehor, Kansas, the City of Tonganoxie, Kansas and the County of Leavenworth were named as defendants in the proceedings below (and are Respondents in this Brief in Opposition) because they entered into an agreement with KDOT. That agreement relates to the highway project but KDOT, acting through the Secretary of Transportation, acts as their agent with respect to this highway project. For simplicity's sake, this Brief in Opposition refers to the defendants/ Respondents, except for the United States of America, jointly as "KDOT."

mit long vehicles or vehicles pulling trailers to turn around safely without protruding into traffic lanes going either direction. KDOT considered several alternatives to the proposed design, but determined that constructing 150-foot turnarounds every two miles provided the safest design and affected the fewest adjoining homeowners. Condemnation of the 4.12 acre tract of the Petitioners' land is necessary to accommodate one of these turnarounds.

Petitioners initially objected to KDOT's condemnation citing concerns about wagon ruts and endangered species on the land. A biological study conducted by the environmental section of KDOT found no wagon ruts would be affected and no endangered species on the land. Petitioners then informed KDOT that the condemnation would violate their religious beliefs because it would require the relocation of a concrete encasement holding the cremated remains of their stillborn daughter. Petitioners alleged that the burial site was an area of religious significance to them and that relocation would violate their rights under the RFRA.

On June 21, 1996, after this Court refused to Stay the Judgment of the Court of Appeals for the Tenth Circuit denying all relief to Petitioners, and after giving them considerable opportunity to relocate the gravesite themselves, KDOT had the encasement professionally removed and preserved for reburial at a location of Petitioners' choice.

B. Proceedings Below

Petitioners filed a Complaint with the United States District Court for the District of Kansas, seeking to enjoin KDOT from commencing both condemnation proceedings and construction of the highway project. On October 28, 1994, Chief Judge Van Bebber of the United States District Court for the District of Kansas granted a Temporary Restraining Order restraining

KDOT from commencing condemnation of the tract in question. A hearing on the Preliminary Injunction was held December 13 and 14, 1994. In an Order filed December 16, 1994, Chief Judge Van Bebber restrained KDOT from taking immediate possession of the tract, but allowed it to initiate condemnation proceedings. A trial on the merits began March 20, 1995, which resulted in judgment for KDOT on all counts and dissolved the preliminary injunction.

On June 9, 1995, the ruling of the trial court to dissolve the preliminary injunction was stayed and the preliminary injunction was reinstated pending appeal to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). On March 15, 1996, the Tenth Circuit affirmed the judgment of the District Court, denying all bases for relief and holding that Petitioners' rights under RFRA would not be violated by the condemnation because the taking would not "substantially burden the free exercise of their religion." *Thiry v. Carlson*, 78 F.3d 1491, 1493 (10th Cir. 1996).

On April 17, 1996, the Tenth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc. On May 17, 1996, Circuit Justice Breyer denied Petitioners' Application for Stay of Judgment. On June 14, 1996, Petitioners filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On June 27, 1996, Petitioners filed a Motion to Enforce Injunction Pending Appeal with the District Court. Chief Judge Van Bebber denied that motion on July 3, 1996.

On December 15, 1994, KDOT filed an eminent domain petition in the District Court of Leavenworth County, Kansas. *See Johnston v. The John D. De Fries Trust, et al.*, No. 9412 CV 00679, slip op. (District Court of Leavenworth County, Kansas, Dec. 15, 1994). On May 10, 1995, the District Court granted an Order Approving Petition and Appointing Apprais-

ers to determine the damages. On July 11, 1995, KDOT paid the $20,000.00 condemnation award into the court, thereby completing the proceeding. Petitioners' appeal of the condemnation was dismissed with prejudice in an Order signed October 13, 1995, and filed June 21, 1996.

At the District Court, KDOT raised the issue of the constitutionality of RFRA, necessitating notification of, and intervention by, the Department of Justice. The District Court later found it was unnecessary to address the constitutional issue because Petitioners had failed to meet RFRA's threshold requirement that their religious beliefs had been "substantially burdened." Consequently, the Department of Justice has not continued to participate in the case.

C. Correction of Misstatements in the Petition

Petitioners' statement that KDOT's witnesses testified there were equally safe alternatives to the turnaround in issue is misleading. As the District Court noted, KDOT did consider three alternatives to the placement of the 150 foot-wide turnaround on Petitioners' tract, but rejected each as ineffective, too expensive, or too intrusive on other adjoining landowners. Regardless, analysis of the alternatives considered by KDOT is irrelevant because both the District Court and the Tenth Circuit found that Petitioners were unable to show a substantial burden, the threshold requirement before consideration of whether the planned design was the "least restrictive means."

Petitioners also misstate that they own unrestricted title to the tract in question. As indicated above, on July 11, 1995, KDOT paid a condemnation award into the Kansas state district court, thereby taking a permanent easement over the property. Petitioner's appeal of the condemnation was dismissed with prejudice in an Order signed October 13, 1995, and filed June 21, 1996.

Petitioners use of the word "destroyed" when describing what has happened to the site in question is both inaccurate and misleading. Petitioners were given ample opportunity to relocate the site to a place of their choice. Only when Petitioners willfully refused to relocate the site did KDOT have it professionally removed and preserved for reburial. Petitioners picked up the encasement the next day and are free to bury it on any of the remaining 146 acres of their farm.

REASONS FOR DENYING THE WRIT

Petitioners' only serious claim in this case is that relocation of the gravesite in question would violate their religious freedom rights under RFRA. Yet the District Court made several fundamental and essential findings of fact that formed the basis of its judgment that Petitioners had failed to meet RFRA's threshold requirement that any rights they were asserting would be "substantially burdened" by KDOT's activities. This fact-bound judgment was unanimously upheld by the Tenth Circuit in a similar, fact-based opinion. Regardless of any abstract interest the substantial burden issue might bring, it is impossible to dislodge this case from its unique and unpersuasive factual setting.

Nor does the abstract legal issue warrant the attention of the Court. Neither of the courts below had difficulty applying a substantial burden standard created by this Court in a very similar case. There is every reason to believe Congress was mindful of that standard when it enacted RFRA, and that it expected the same standard to be employed in RFRA-based litigation. There is no split among the Circuits, with most using the same standard employed below.

The case has also become moot. The action is, and has

always been, to enjoin KDOT from taking the site. That condemnation and accompanying appeal are both final, and the site has been lawfully taken for the highway project in question.

A. The Decisions Below are Fact-Bound.

The decisions of both lower courts turned on the District Court's factual findings, as each body recognized that RFRA imposes a burden on the plaintiff to prove "three threshold requirements: the [challenged] government action must 1) substantially burden 2) a religious belief rather than a philosophy or way of life, 3) which belief is sincerely held by the plaintiff." *Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir. 1996). While both the District Court and the Tenth Circuit found adequate proof that Petitioners' beliefs were religious and sincerely held, neither court found sufficient proof that the beliefs were "substantially burdened" by condemnation of their land and the gravesite's resulting relocation. 78 F.3d at 1495; *Thiry v. Carlson*, 887 F. Supp. 1407, 1413 (D. Kan. 1995).

The District Court made several specific factual findings upon which it based its ultimate conclusion that Petitioners' religious beliefs were not substantially burdened. It found that though the gravesite's former location held a "special meaning" for Petitioners, "their religious beliefs and practices will continue even if the planned highway is constructed." 887 F. Supp. at 1413. It also found that Petitioners had identified "no religious belief or tenet that would forbid in all situations the moving of a gravesite." *Id.* Indeed, Petitioners testified that they would agree to relocate the gravesite if they thought it was necessary for a safe highway. *Id.* From these findings, the District Court concluded that the proposed governmental action "would not impose a substantial burden" sufficient "to give rise to a claim under RFRA." *Id.*

The Tenth Circuit relied on many of the same facts em-

phasized in the District Court's opinion in also concluding that Petitioners' religious beliefs were not substantially burdened. *See* 78 F.3d at 1495-96 (citing portions of the trial transcript containing Petitioners' testimony that their religious beliefs would continue, that they had worshiped in areas other than the gravesite, and that Petitioners' religious views would permit them to agree to relocating the gravesite if Petitioners thought it was necessary for a safe highway). Based on these facts, the Tenth Circuit held the District Court did not err when it determined that Petitioners' rights were not "substantially burdened" by the proposed taking. *Id.* at 1496. In so doing, the Tenth Circuit was faithful to this Court's mandates that an appellate court give great deference to a trial judge's findings of fact. *See, e.g., Anderson v. Bessemer City,* 470 U.S. 564, 573-574 (1985) (appellate court may not reverse findings of fact when they are "plausible in light of the record viewed in its entirety" even when convinced "that it would have decided the case differently").

In sum, both the District Court and the Tenth Circuit held against Petitioners' RFRA claim because they failed to carry their burden to prove a "substantial burden." Reconsidering their careful evaluation of the evidence would produce nothing more than yet another evaluation — a third — of the evidence's adequacy under a well-established legal standard. In no way would that exercise resolve a significant legal question or contribute meaningfully to the clarity of legal doctrine in the federal courts. The Court should not devote its energy to such a fact-bound endeavor.

B. The Courts Below Used the Proper Definition of "Substantially Burdened" Under RFRA.

The application of RFRA to these facts originally portended several interesting legal issues. Among those were: (1)

whether the highway safety design at issue was part of a compelling state interest; (2) whether the particular construction design constituted KDOT's least restrictive alternative to remedy the safety problems; and (3) most intriguing, whether RFRA itself was constitutional.

None of those issues is implicated by this Petition, however, because both lower courts held that Petitioners could not meet the threshold test Congress established as a gateway to RFRA's protections. The plain language of RFRA requires that governmental action "substantially burden" the exercise of religion to invoke the statute's requirements. 42 U.S.C. § 2000bb-1. Both the Chief Judge of the District Court of Kansas and a unanimous panel of the Tenth Circuit found no such burden occurred under these facts. Thus, neither court reached the other, potentially more interesting issues.

This failure to meet their threshold burden has constrained Petitioners to ask this Court either (1) to overturn facts found by the District Court and upheld by the Tenth Circuit, or (2) to seek a change in the legal standard unanimously employed by both lower courts, a standard that tracks exactly with the constitutional precedents of this Court and is specifically left untouched by RFRA. The last subsection reflected the futility of the first line of attack; this subsection will reflect the futility of the second.

Both lower courts relied on this Court's last articulation of the constitutional meaning of "substantially burdened" in deciding Petitioners had not met RFRA's threshold standard. That articulation came, interestingly, "[i]n a case strikingly similar to [this one]." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996).

Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439 (1988), held that the federal government did not substan-

tially burden free exercise by building a road through land the plaintiffs considered sacred. In reaching its decision the Court noted that while the government's action made the plaintiffs' religious exercise more difficult, it had "no tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. at 450. Earlier the Court had noted that the activity neither coerced the individuals into violating their beliefs nor "penalized religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 449.

Together, these tests from *Lyng* represent this Court's articulation of the "substantial burden" standard. The substantial burden requirement was employed, though not defined, again in *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989), and *Employment Division v. Smith,* 494 U.S. 872, 883 (1989). It has not been altered by this Court, and both lower courts employed it in this case. 78 F.3d at 1495; 887 F. Supp. at 1412-13. As indicated in subsection A, neither court had difficulty finding Petitioners' alleged harm fell well short of the mark.

There are several persuasive reasons to conclude that Congress intended to adopt the *Lyng* standard when it passed RFRA several years after that decision. First, of course, by choosing the words "substantially burdened" as the threshold test to the statute's protections, Congress knew it was adopting the exact language employed by the Court in its most recent free exercise cases. That so, Congress both knew and expected that the language would be interpreted identically in RFRA claims as it had been in constitutionally-based decisions. *See* S. REP. No. 111, 103rd Cong., 1st Sess. 8 (1993).

That obvious point is underscored by the explicit purpose and legislative history of RFRA. By including the Purpose of the Act in Section 2, Congress took care to communicate that RFRA was passed "to restore the compelling interest test

as set forth in *Sherbert v. Verner* . . . *and Wisconsin v. Yoder* . . . to all cases where free exercise of religion is substantially burdened; . . ." 42 U.S.C. 2000bb(b)(1). While that statement makes very clear that Congress expected the state to meet a higher burden once a RFRA plaintiff proved his religious activities had been substantially burdened, it is equally clear the increased protection is triggered only *after the adherent has met that threshold standard.* Congress intended no change in existing jurisprudence prior to the shift in burden from adherent to government.

> This bill is . . . the restoration of the legal standard . . . applied in [pre-*Smith*] decisions. S. REP. No. 141, 103rd Cong., 1st Sess. at 9 (1993).

The final reason it is clear Congress expected the *Lyng* standard to apply to RFRA actions is that the holding mirrors the two prior Court decisions, *Sherbert and Yoder*, Congress cited in the body of RFRA as the models of jurisprudence it was restoring. 42 U.S.C. § 2000bb(b)(1). *Sherbert v. Verner* held an adherent could not be denied a benefit enjoyed by other citizens because of her religious observance. 374 U.S. 398 (1963). *Wisconsin v. Yoder* held an adherent could not be coerced into violating his religious beliefs. 406 U.S. 205 (1972). Fused together, these holdings — the twin pillars on which RFRA was constructed — exactly constitute the definition of "substantial burden" articulated in *Lyng*. 485 U.S. at 449.

The circuits have had little, if any, difficulty adjudicating RFRA's "substantial burden" test. Three circuits appear to have adopted tests identical to that used in *Lyng* and in the lower courts in this case. *Goodall v. Stafford County School Board,* 60 F.3d 168, 172-73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam). Two others have adopted what the

Seventh Circuit termed "a more generous definition." *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996).

Ironically for Petitioners in this action, the source of this second, "more generous" definition is the Tenth Circuit's opinion in *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). Yet, in this appeal, the Tenth Circuit panel — which included Judge McKay, the author of the *Werner* opinion — hinted strongly that *Lyng* was the more appropriate standard. More important, it held that Petitioners had failed to meet the substantial burden requirement under either *Lyng* or *Werner*. 78 F.3d at 1495.

C. Petitioners Have No Valid Claim(s) Under Section 1983.

Petitioners have also raised a claim under 42 U.S.C. § 1983. While this claim has elusively shifted throughout the case, it seems now to stem from *Employment Division v. Smith*, where this Court suggested that strict scrutiny might be employed to neutral laws of general applicability if an adherent could establish that both a free exercise right and a second, separate fundamental right were substantially burdened. 494 U.S. at 881.

Both courts below gave short shrift to the claim, 78 F.3d at 1496; 887 F. Supp. at 1414-15, which was once two separate claims. 887 F. Supp. at 1414-1415. Regardless of its current posture, the claim merits little attention.

The first and most obvious problem is that the predicate of any such "hybrid" claim is a first/fourteenth amendment free exercise violation. Yet Petitioners have not explained how they can establish a free exercise violation if they can not even establish a statutory violation under RFRA. At the very least a first amendment claim would require Petitioners to prove that their free exercise had been "substantially burdened," returning them

to the jurisprudence that sank their RFRA claim.

Difficulties also abound with the amorphous "right" Petitioners offer as their second constitutional protection. The first, and terminal, difficulty is the District Court found Petitioners "failed to present evidence" that any constitutional rights would be violated by KDOT's activities. 887 F. Supp. at 1415. Even if there were evidence, Petitioners have yet to cite a single case establishing the claimed substantive due process right of "family unity and integrity." Finally, even if such a right existed, both courts below found as a matter of law it would not be violated by the project in question because Petitioners can still be buried by their daughter. 78 F.3d at 1496; 887 F. Supp. at 1415.

D. Petitioners' Claims Are Moot.

This action has always been solely to enjoin KDOT from removing the encasement and proceeding with construction. Yet the encasement has now been removed and preparation for construction has now begun. Thus, the final reason why this Court should deny the writ is that the facts have now changed and all original legal questions have become moot.

KDOT was enjoined from proceeding with the construction, though not the condemnation, of the tract in question during much of this litigation. Condemnation was completed in the summer of 1995. Petitioners appealed the condemnation, and a Journal Entry with Prejudice was signed on October 13, 1995, and filed on June 21, 1996. A copy of the Journal Entry with Prejudice is attached as Appendix A.

The Tenth Circuit entered its judgment against Petitioners on March 15, 1996. On April 17, 1996, the Tenth Circuit denied a request for rehearing and a suggestion for rehearing en banc. See Petitioners' Appendix F. On May 17, 1996, Justice

Breyer denied Petitioners' Application for a Stay of Judgment. On June 27, 1996, Petitioners filed a Motion to Enforce Injunction Pending Appeal with the District Court. Chief Judge Van Bebber denied that motion on July 3, 1996.

After two written requests that Petitioners remove the concrete encasement buried at the site, on June 21, 1996, KDOT arranged for professional removal of the encasement. Petitioners picked up that encasement the next day.

Because the encasement has been removed, and construction of the highway has begun, this controversy has thus become moot, not "admitting of specific relief through a decree of a conclusive character." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971), citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF LEAVENWORTH COUNTY, KANSAS

THE JOHN D. DE FRIES TRUST, ET AL., Plaintiff, vs. E. DEAN CARLSON, SECRETARY OF TRANSPORTATION OF THE STATE OF KANSAS, Defendant.	Case No. 9507 CV 391

Pursuant to Chapter 60 K.S.A.

JOURNAL ENTRY OF DISMISSAL WITH PREJUDICE

NOW on this 13th day of October, 1995, the same being a regular day of the District Court, this cause comes on to be heard on the joint motion of the parties for dismissal of this action, with prejudice, at the cost of the landowner.

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that this cause be and the same is hereby dismissed with prejudice at the cost of the landowner herein.

s/ David J. King
JUDGE

APPROVED BY:

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